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## IN THE SUPREME COURT

### STATE OF ARIZONA

KAREN FANN, in her official capacity as  
President of the Arizona Senate; WARREN  
PETERSEN, in his official capacity as  
Chairman of the Senate Judiciary  
Committee; and the ARIZONA SENATE,  
a house of the Arizona Legislature,

Petitioners,

v.

THE HONORABLE MICHAEL KEMP, in  
his official capacity as a judge of the  
Superior Court for Maricopa County,

Respondent; and

AMERICAN OVERSIGHT,

Real Party in Interest.

No. \_\_\_\_\_

Court of Appeals No.  
1 CA-SA 21-0141

Maricopa County Superior Court No.  
CV2021-008265

### **PETITIONERS' EMERGENCY MOTION FOR STAY**

Pursuant to Rule 8(d), Rules of Procedure for Special Actions, Petitioners Arizona Senate; Karen Fann, in her official capacity as President of the Arizona Senate; and Warren Petersen, in his official capacity as Chairman of the Senate Judiciary Committee (collectively, the “Senate”) respectfully move for a stay of the Superior Court’s “Order to Produce Public Records” entered on August 2, 2021 (the “August 2 Order”) pending this Court’s adjudication of the Petitioners’ Petition for Review.

### **FACTUAL BACKGROUND**

The August 2 Order commands the President of the Senate to (somehow) procure the internal records of a non-party private corporation, and further directs the Senate to produce to Real Party in Interest American Oversight those documents that the Superior Court deemed “public records” pursuant to the Arizona Public Records Act, A.R.S. § 39-121, *et seq.* (the “PRA”). *See* APPV1-0002. The Court of Appeals granted an initial stay of the August 2 Order. On August 19, 2021, however, the Court of Appeals issued a memorandum decision accepting special action jurisdiction but denying relief and lifting the stay. The Senate has filed a Petition for Review in this Court.

### **ARGUMENT**

“A party seeking a stay on appeal must thus establish the following elements: [1] a strong likelihood of success on the merits; [2] irreparable harm if the stay is not granted; [3] that the harm to the requesting party outweighs the harm to the party opposing the stay;

and [4] that public policy favors the granting of the stay.” *Smith v. Arizona Citizens Clean Elections Comm’n*, 212 Ariz. 407, 410, ¶ 10 (2006). All four criteria impel the issuance of a stay.

**I. The Senate Is Likely to Succeed on the Merits Because Legislative Immunity Extends to Decisions to Release or Withhold Alleged Legislative Records and the Superior Court’s Notion of “Constructive” Custody Is Wrong as a Matter of Law**

In the interests of efficiency, the Senate incorporates by reference its full merits argument in the Petition for Review.

In short, the Court of Appeals committed two errors of law. First, its conclusion that the Senate is not immune from judicial diktats ordering it to divulge alleged legislative records flies in the face of more than a century of federal and Arizona precedents recognizing legislative immunity as a bulwark against *all* claims seeking *any* variant of relief that arise out of an official legislative function, such as the audit. *See Arizona Indep. Redistricting Comm’n v. Fields*, 206 Ariz. 130, 136, ¶¶ 15–16 (App. 2003) (When legislators “are acting within their ‘legitimate legislative sphere,’ the Speech or Debate Clause [in Article IV, Part 2, Section 7 of the Arizona Constitution] serves as an absolute bar to . . . civil liability.”); *Supreme Court of Va. v. Consumers Union of the U.S.*, 446 U.S.

719, 725–26, 733 (1980) (holding that legislative immunity precluded claims for declaratory and injunctive relief).

As this Court recently affirmed, the act of releasing (and, by extension, of withholding) an alleged legislative record is itself a “legislative function” insulated from judicial second-guessing by legislative immunity. *See Mesnard v. Campagnolo*, -- Ariz. --, 489 P.3d 1189, 1195-96, ¶¶ 22-23 (2021) (adding that “[w]hether [a legislator] violated House rules, statutory law, or even the state or federal Constitution has no bearing on whether his actions were legislative functions and thus afforded immunity.”).

Second, the Court of Appeals found that the Senate was required to fetch and produce the internal corporate records of not only its corporate vendor but also the *subcontractors* of the vendor. To rationalize this invasive and sweeping command, the Court of Appeals coined a concept it termed “constructive” custody—a notion that is foreign to the text of the Public Records Act and to the germane Arizona (and analogous federal) precedents. Tellingly, the trial court cited not a single Arizona authority to sustain its doctrinal creation. Further, the fruits of the Court of Appeals’ doctrinal innovation will not be confined to this case; if it stands, all private vendors serving virtually every division of state, county and municipal government in Arizona will be potentially exposed to

liability under the Public Records Act, and all internal files bearing a substantial nexus to its governmental engagements will be subject to inspection by the public.

**II. The Absence of a Stay Will Irreparably Injure the Senate by Extinguishing Key Defenses**

A stay is appropriate when necessary “to preserve the status quo during the appeal and to protect the unsuccessful party from any irreparable harm that would occur from enforcing the ruling on the injunction.” *State ex rel. Corbin v. Tolleson*, 152 Ariz. 376, 378 (App. 1986). Compliance with the August 2 Order prior to the adjudication of the Petition for Review would necessarily moot substantial facets of the Senate’s constitutional and statutory defenses. Once the Senate has produced materials to American Oversight they cannot be clawed back—and once the Senate takes actual possession of materials from a third party, its primary factual defense (*i.e.*, that the lack of custody is dispositive) will dissipate—if not in this case, then certainly with respect to claims under the Public Records Act by third parties. *See generally Perry v. Schwarzenegger*, 591 F.3d 1147, 1157, 1158 (9th Cir. 2010) (recognizing in context of order compelling the disclosure of information that “[a] post-judgment appeal would not provide an effective remedy”). The denial of a stay would therefore have the practical effect of denying the Senate its right to petition this Court for relief.

### III. The Balance of Equities and Public Policy Considerations Favor a Stay

The constitutional undercurrents to this case are of critical and enduring importance. When, as here, “a civil action is brought by private parties, judicial power is still brought to bear on Members of [the Legislature] and legislative independence is imperiled.” *Eastland v. U. S. Servicemen’s Fund*, 421 U.S. 491, 503 (1975). A wrongful abrogation of legislative immunity is not merely a transient inconvenience to the institution and its members; it works an irreparable corrosion of the constitutional boundaries demarcating the legislative and judicial spheres.

By contrast, American Oversight struggles to articulate its own equities, beyond a rote recitation of pleasant-sounding platitudes. If American Oversight really is entitled to the documents it seeks (to the extent they exist), it will get them in due course. There is no record evidence *whatsoever* that any spoliation has occurred or that there is any material risk that it will occur. *Cf. India Brewing, Inc. v. Miller Brewing Co.*, 237 F.R.D. 190, 195 (E.D. Wis. 2006) (“Here, IBI has nothing but speculation regarding whether Miller has failed to produce what it is required to produce, and no evidence of spoliation has been presented on the record before the court.”). Further, there is no equitable or policy imperative that requires that these materials be obtained, produced or otherwise made available *now*, before the Court can carefully weigh the substantial legal questions

presented by the Petition for Review, and ensure that all cognizable constitutional immunities and statutory protections are vindicated.

### CONCLUSION

For the foregoing reasons, the Senate requests that this Court stay the Superior Court's August 2 Order pending its adjudication of the Petition for Review.

RESPECTFULLY SUBMITTED this 19th day of August, 2021.

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## **Exhibit A**



8/2/2021 3:37pm  
P. McKinlay, Deputy

*Attorneys for Plaintiff*

## MARICOPA COUNTY

Defendants.

## ORDER TO PRODUCE PUBLIC RECORDS

On May 19, 2021, Plaintiff American Oversight (“AO”) filed a Verified Complaint and Application for Order to Show Cause under A.R.S. § 39-121.02 against Defendants Karen Fann, Warren Petersen, and the Arizona Senate (“Senate Defendants”) seeking documents known as the “Withheld Records.”<sup>1</sup> The parties then agreed to a schedule to resolve this expedited statutory special action, and further agreed that the Senate Defendants’ motion to dismiss would constitute their response to the Application for Order to Show Cause. The Court heard oral argument on July 7, 2021 on the parties’ submissions.

<sup>1</sup> These records are defined in Paragraph 63 of the Verified Complaint.

1 On July 15, 2021, the Court entered a Minute Entry Order (incorporated herein by  
2 reference) in which it rejected the two defenses raised by the Senate Defendants: (1) Arizona's  
3 Public Records Law does not apply to records held by agents of public officers and public  
4 bodies that perform core government functions, and (2) whether the Senate Defendants  
5 complied with the Public Records Law is a nonjusticiable political question. The Court thus  
6 held that "any and all documents with a substantial nexus to the audit activities are public  
7 records" and further, that:

8 [a]ll documents and communications relating to the planning and execution of the  
9 audit, all policies and procedures being used by the agents of the Senate  
10 Defendants, and all records disclosing specifically who is paying for and financing  
11 this legislative activity as well as precisely how much is being paid are subject to  
12 the PRL. Senate Defendants must demand the records from CNI and the  
subvendors or invoke the indemnification clause of the contract now that Senate  
Defendants are engaged in litigation.

13 Based on the Verified Complaint, Application for Order to Show Cause, and the Court's  
14 July 15, 2021 Minute Entry Order, and good cause appearing,

15 IT IS HEREBY ORDERED that the Senate Defendants comply with A.R.S. § 39-121,  
16 *et seq.*, and immediately provide AO with access to (or copies of) the Withheld Records.

17 DATED this 2<sup>nd</sup> day of August, 2021.

18   
19 Honorable Michael W. Kemp